APPENDIX.

DECISION OF CIRCUIT COURT OF APPEALS.

October 25, 1943.

Before SPARKS, MAJOR and KERNER, *Circuit Judges.*

MAJOR, *Circuit Judge.* The defendant on the first day of September, 1935, executed its surety bond, conditioned upon the faithful performance by Lawrence J. O'Connell of his duties as Chief Security Examiner of the Industrial Commission of the State of Illinois (hereinafter referred to as the Commission), a body charged with the administration of the Illinois Workmen's Compensation Act. Plaintiff was an employer subject to the provisions of such Act, and on August 9, 1935, for the purpose of qualifying as a self-insurer, entered into an Escrow Agreement with the Commission, acting by and through O'Connell, and deposited with the Commission a $10,000.00 United States Treasury Bond to be held by it as a guarantee for the payment of any awards entered against plaintiff under such Act. This arrangement continued from the date of the Escrow Agreement until May 24, 1941, when plaintiff furnished the Commission an insurance policy in lieu of the aforesaid deposit. Thereupon a request was made for the return of the $10,000.00 United States Treasury Bond, and on January 30, 1942 plaintiff was informed by the Commission that such bond was missing. It later developed that the bond had been converted by O'Connell to his own use and has not been returned or made good to the plaintiff.

Both plaintiff and defendant filed motion for summary judgment and the cause was submitted to the court on the pleadings, stipulation of facts and briefs. The court granted defendant's motion for summary judgment in its favor and entered judgment, from whence this appeal comes.

The contested issues may be briefly stated as (1) did the Commission have authority to accept and hold plaintiff's property as security for the payment of compensation provided by the Act? and (2) even so, did O'Connell as Chief Security Examiner of the Commission act in an official capacity in accepting such deposit? Plaintiff argues that both questions must be answered in the affirmative, while the defendant argues to the contrary. In addition, the defendant relies upon the statute of limitation as precluding plaintiff's right to recovery.

The question of the Commission's authority necessarily depends upon a construction of the pertinent provisions of the Act. Sec. 26 (Ill. Rev. Stats. 1941, Ch. 48, Par. 163) imposes upon an employer subject to the Act the duty to furnish, and upon the Commission the duty to require, assurance of the employer's financial ability to meet any awards of compensation which may be made to its employees. Par. (a)(1) provides: "File with the commission a sworn statement showing his financial ability to pay the compensation provided for in this Act * * *." Then follows in the same paragraph this provision: "If any such employer fails to file such a sworn statement, or if the sworn statement of any such employer does not satisfy the commission of the financial ability of the employer who has filed it, the commission shall require such employer to, (2) Furnish security, indemnity or a bond guaranteeing the payment by the employer of the compensation provided for in this Act." Par. (3) authorizes the employer to insure his entire liability to pay compensation in certain authorized insurance carriers. (This paragraph is not involved in this suit.) Par. (4) provides: "Make some other provision, satisfactory to the industrial commission, for the securing of the payment of compensation provided for in this Act."

Sec. 16 of the Act (Ill. Rev. Stats. 1941, Par. 153) authorizes the Commission, among other things, to "make and publish rules and orders for carrying out the duties imposed upon it by law * * * and the process and procedure before the board shall be as simple and summary as reasonably may be." The sole rule promulgated by the

Commission pertinent to the instant inquiry is rule 39, as follows:

> "Application for permission to become a self-insurer shall be accompanied by a current financial statement of the applicant, which statement shall show to the satisfaction of the Industrial Commission ability on the part of the employer to discharge accruing liability under the Workmen's Compensation Act. However, no application to become a self-insurer will be entertained by the Industrial Commission unless the applicant for such privilege shall have deposited in the name of an approved trustee and in an approved depositary a fund sufficient to discharge all liability that may have accrued by reason of awards for the payment of compensation that have become final on the date of such application."

It is the position of the defendant that the legislature has neither specified the manner by which an employer is to furnish security nor to whom, and that it has conferred upon the Commission the authority to prescribe such specification by rule. Further, the defendant contends that the Commission having by rule 39 prescribed a certain way, the security cannot be deposited in any other way. On the other hand, it is the position of the plaintiff that the legislature clearly conferred such authority upon the Commission and that rule 39 by its express terms is not applicable to the instant situation.

The question presented has not been decided by an Illinois court. Numerous Illinois authorities are cited, largely on rules of statutory construction, which we find of little benefit. We shall refer to one of such rules for the reason that the court below, in a carefully prepared opinion, appears to have attached considerable weight to its pertinency. The substance of the rule, as stated in *People* v. *Wiersema*, 361 Ill. 75, 85, is that the expression of one thing or one mode of action in a statutory enactment excludes any other, even though there be no negative words prohibiting it. Predicated upon this rule of construction, it is urged that rule 39, which it is claimed provided the sole method of furnishing security, excludes all other methods. In the Wiersema case and all others which we have examined, the rule was applied solely to a statu-

tory enactment. In no case, so far as we know, has the expression of one mode of action by rule been held to exclude some other mode of action provided by statute. It is our view that this rule of construction so heavily relied upon is without application.

We have read and reread the statutory language involved and we think it clearly confers upon the Commission the authority to accept from an employer security for the purpose of assuring the discharge of his liability. It is insisted that if the legislature had so intended it would, after the word "furnish," have inserted the words "to the Commission." True, that would have removed all doubt, but we do not think it was necessary. Par. (2) must be read in connection with the other paragraphs of the section. Par. (1) provides for the filing with the Commission of a statement of financial ability. If the Commission is not satisfied with that statement, it shall require the employer to furnish security, etc. Par. (5) authorizes the Commission to demand the filing with it of evidence of compliance with this section. Par. (5)(b) provides that the statement of financial ability or security, indemnity or bond or amount of insurance shall be subject to the approval of the Commission. If it was the intention of the legislature to limit the authority of the Commission solely to an approved depository, it is just as reasonable, and more so in our view, that it would have so declared. Not only was the Commission authorized to accept (1) a financial statement, (2) security, etc., (3) a policy of insurance, but it was authorized (4) to "make some other provision satisfactory to it for the securing of the payment of compensation."

This brings us to a consideration of rule 39 (heretofore quoted), so heavily relied upon by the defendant. It is the position of the defendant that this rule provides the sole and exclusive manner by which an employer may become a self-insurer, that is, by depositing a fund in an approved depository. In the first place, we do not think the rule is capable of such construction. This rule contains two sentences, and it is the second upon which defendant relies. It expressly provides that the fund deposited shall be "sufficient to discharge all liability that may have accrued by reason of awards for the payment of compensation that

have become final on the date of such application.'' Surely this plain, unambiguous language can have no application to an employer who has no liability by reason of awards which have become final. Defendant's interpretation of the rule renders meaningless the first sentence, which, in conformity with Par. (1) of the statute, provides for a financial statement satisfactory to the Commission. While defendant admits that this rule is procedural, it also argues that it is jurisdictional. It must be a novel theory that an administrative agency can by its own rules determine its jurisdiction. We are of the opinion that the jurisdiction of an administrative agency, like that of a court, is determined solely by its creator.

Furthermore, the construction of this rule sought by the defendant would present a serious challenge to its validity. It would nullify at least some provisions of the statute. If the sole manner of complying with the Act is by placing funds in a depository approved by the Commission, what becomes of Par. (1) authorizing the employer to comply by furnishing a financial statement? Of course, it may be argued that the acceptance of such a statement is discretionary with the Commission, but this would not justify the Commission in arbitrarily or capriciously refusing to permit compliance in such manner. The Commission no doubt is powerless to exceed the authority which the legislature has conferred, but on the other hand we do not think it can minimize such authority by rule, and certainly not when such rule is in contravention of the statute.

This brings us to the question of O'Connell's authority to act for the Commission. Of course, if the Commission had no authority to accept plaintiff's deposit, O'Connell was likewise without authority. Having held that the Commission had the authority, we think there is little room to doubt but that O'Connell was acting in his official capacity. The record discloses in numerous ways that he was held out to the public as the agent and representative of the Commission. The letterheads and stationery of the Commission contained the names of the Governor of the State, the members of the Commission and "Lawrence J. O'Connell, Chief Security Examiner." All the

correspondence and the Escrow Agreement pertaining to the instant matter were kept in the files of the Commission, properly numbered and indexed. The same is true of some thirty other cases wherein O'Connell accepted deposits on behalf of the Commission.

The defendant attached to its motion for summary judgment an affidavit made by a former chairman of the Commission that O'Connell's authority was limited to an examination of financial ratings of employers who applied to the Commission for self-insurance and to inform them of the amount of securities which should be deposited in the name of a qualified trustee or bank, and that the affiant had no knowledge of any instance where the Commission either acted or assumed to act as a qualified depositary. The fact that this former chairman had no knowledge of what was transpiring in the Commission's office does not alter the law which fixed its authority or the fact that O'Connell was acting on its behalf. No effort was made by the latter to conceal the file containing the matter applicable to plaintiff's deposit. It must be held, we think, that the Commission at least had constructive knowledge of O'Connell's acts and that by the exercise of any kind of diligence would have had actual knowledge. If defendant's position be accepted, it means that plaintiff, from August 9, 1935 (the date of its deposit) until May 24, 1941 (when it furnished an insurance policy), was operating without compliance with the Act. We cannot believe and will not impute to the Commission a degree of negligence which permitted such a situation to exist.

Furthermore, plaintiff, in response to its request for return of its bond, received a letter from the Commission dated July 22, 1941, signed by the chairman of the Commission, advising that it was a rule of the Commission that collateral be held one year from the effective date of the insurance policy, as employees had a right to file a claim during that period of time, and that "if on May 24, 1942, there are no claims, awards or judgments of this Commission, against the Pinkerton's National Detective Agency, your collateral will be released." At that time there evidently was no thought in the mind of the chairman but that the Commission had authority to accept

the deposit or that O'Connell had acted outside the scope of his employment.

We are also of the view that there is no merit in defendant's contention that the action is barred by the statute of limitations. The suit was brought July 21, 1942, and it is argued that the action accrued early in 1936 at the time subsequently admitted by O'Connell as being the time when he converted plaintiff's bond to his own use. On this premise it is argued that the Illinois 5-year statute of limitation (Ill. Rev. Stats., Ch. 83, Sec. 16), applicable to action on unwritten contracts, etc., is controlling. Plaintiff disputes this contention and claims that the action is on a written contract and therefore comes within the 10-year statute of limitation (Ill. Rev. Stats. 1941, Ch. 83, Par. 17). A reading of the Illinois authorities leaves us in some doubt as to which contention should prevail, although we are inclined to the view that the suit is upon a written instrument, namely, the Escrow Agreement entered into between plaintiff and the Commission.

However, even though the 5-year limitation provision be otherwise applicable, it is not here controlling. This is so for the reason that the action did not accrue at the time O'Connell converted plaintiff's property, as the latter had no knowledge of such conversion until long afterward. In our judgment, plaintiff's cause of action did not accrue until January 9, 1942, when plaintiff made demand for the return of its property and there was a failure to return it, as required by the contract between plaintiff and the Commission. Plaintiff had no right to the return of its property until it had furnished other means for the protection of its employees, in compliance with Sec. 26 of the Act. When that was done, plaintiff made a demand for such return, and it was only upon the Commission's refusal that plaintiff was entitled to bring suit. *Selleck v. Selleck, et al.*, 107 Ill. 389.

Holding as we do that the Commission had the authority and that O'Connell was acting within the scope of his employment in accepting on behalf of the Commission plaintiff's United States Treasury Bond, it follows that defendant is liable on its bond in suit. The cause is, therefore, reversed and remanded, with directions that a judgment be entered in behalf of the plaintiff.

DECISION OF DISTRICT COURT.

SULLIVAN, *District Judge.*

December 23, 1942.

This is a suit to recover damages for the loss of a Ten Thousand Dollar United States Treasury bond, together with attached interest coupons, which plaintiff alleges it owned on August 9th, 1935, and on that day deposited, with its attached coupons, with Lawrence J. O'Connell, Chief Security Examiner for the Illinois Industrial Commission, in order to qualify as a self-insurer under Section 26 of the Workmen's Compensation Act. The complaint also alleges that some time during 1936 the Chief Security Examiner appropriated said bond to his own use by pledging it as collateral for Ten Thousand Dollar personal loan made to him by Dave Bosley, Al Goldberg and I. L. Goldman, doing business as Associated House Wreckers, named as defendants in Count One of the complaint.

Fidelity and Deposit Company of Maryland, surety on the Chief Examiner's bond, dated September 1st, 1935, and executed to the Industrial Commission, is made sole defendant in Count Two of the complaint.

All defendants have filed their answers denying the material allegations of the complaint.

On September 21st, 1942, under Rule 56(b) the Fidelity and Deposit Company of Maryland filed its motion asking for summary judgment under Count Two of the complaint. Plaintiff, on the same date, also filed a motion asking for summary judgment in its favor under the same count. The case is submitted to the court on the pleadings, a stipulation of facts, and briefs filed on behalf of the Pinkerton Detective Agency and the Fidelity and Deposit Company of Maryland.

Plaintiff contends that having subsequently provided other protection for its employees as a self-insurer, which protection was approved as satisfactory by the Commission, it was then entitled to the return of its United States Treasury bond previously deposited with the Commission

for the purpose of qualifying as such self-insurer; and that upon failure and refusal of O'Connell, Chief Security Examiner, to account to plaintiff for said Treasury bond a cause of action arose in its favor against the surety on the Chief Security Examiner, to account to plaintiff for same, a cause of action arose in its favor against the surety on the Chief Security Examiner's official bond.

The Fidelity and Deposit Company in its motion sets out that deposit by plaintiff of the United States Treasury bond with the Chief Security Examiner was beyond the terms and intent of the Workmen's Compensation Act; that securing such deposit was a usurpation by the Chief Security Examiner of a power which the Commission itself did not possess, and that such action was therefore clearly null and void. That defendant Fidelity and Deposit Company, as surety on the Chief Security Examiner's bond, did not become liable to plaintiff as a result of such deposit, and that plaintiff's cause of action is against O'Connell personally.

The first question for the court to determine is whether the Industrial Commission had the power to act as trustee or depositary for securities when an employer sought to become a self-insurer under Section 26 of the Illinois Workmen's Compensation Act (Illinois Stat. 1941, Ch. par. 163).

Section 26, imposing upon the Commission the duty of obtaining from all employers under the Act assurance of their financial ability to pay compensation, requires:

1. That every employer shall file with the Commission a sworn statement of his financial ability to pay the compensation.

2. That if the employer fails to file such statement, or, if filed, it does not satisfy the Commission of the financial ability of the employer, the Commission shall require the employer to furnish security, or indemnity, or a bond, guaranteeing the payment by the employer of the compensation provided for in this Act.

3. That the Commission may require the employer to insure his entire ability to pay such compensation in an authorized insurance company.

4. That the Commission may require the employer to make some other provision satisfactory to the Commission for securing the payment of compensation.

5. That the Commission may require the employer to file with the Commission from time to time evidence of its compliance with this section.

> (b) The sworn statement or security or indemnity or bond shall be subject to the approval of the Commission, upon which approval the Commission will send the employer written notice of its approval. The certificate of compliance with the aforesaid requirement to furnish security or indemnity or bond shall be delivered by the insurance carrier to the Commission within five days.
>
> (c) Whenever the Commission shall find the insurance company to be insolvent or that the insurance company practices a policy of unfairness in the settlement of compensation awards, the Commission may order the company to discontinue business in the state.
>
> (d) If the employer shall fail or neglect to comply with the provisions with respect to sworn statement or security or indemnity or bond, he shall be deemed guilty of a misdemeanor and punishable by fine of not more than $100. nor more than $500. for every day of such delinquency.

Plaintiff insists that Section 26 of the Act gives to the Commission as broad powers with respect to accepting deposits as it is possible by language to confer, and in support of this quotes the portions of Sub-paragraphs 2 and 4 which provide:

> (2) "Furnish security, indemnity or a bond guaranteeing the payment by the employer of the compensation provided for in this Act, * * * or
>
> (4) "Make some other provision, satisfactory to the Industrial Commission, for the securing of the payment of compensation provided for in this Act, * * *."

I do not agree with plaintiff that the above language clearly grants power to the Commission either to require or to receive deposits of securities *with it,* such as was made in the instant case. Had the Legislature intended that the Commission should be given power under the Act to serve as a trustee or depositary, I believe it would have set out in plain and certain terms the manner in which it was to be done, in order that there would be no doubt concerning the power of the Commission to so act. The Legislature would also have provided in the same certain terms the manner in which self-insurers might deposit their securities, and be protected by the Commission while such securities were on deposit with it. The Legislature would not have left it for the courts to assume that by the use of the phrase "the Commission shall require such employer to furnish security, indemnity, or a bond guaranteeing the payment by the employer of the compensation," it intended thereby to authorize the Commission to act as a depositary or trustee. Or that the use of the phrase "make some other provision satisfactory to the Industrial Commission" gave the Commission power to make any sort of arrangement it saw fit with self-insurers, provided only that it was a satisfactory arrangement to the Commission. And finally on the question of the large amount of securities of which the Commission would constantly be the custodian, the Legislature would surely have provided for some other method of protection to self-insurers, other than the fidelity bond of one employee who served as a security examiner, and who furnished a bond in the sum of $20,000 conditioned upon the faithful performance of his duties as an employee of the Commission.

The Commission itself never seems to have considered that the Workmen's Compensation Act empowered it to act as a depositary or trustee in the case of self-insurers. No instances are shown where it ever did so act, except the thirty-four cases in which O'Connell secured the deposit of securities which he allegedly misappropriated. O'Connell as an employee of the Commission possessed no greater power than what the Commission itself possessed. The Industrial Commission is one of the divisions of the Illinois Department of Labor, and all of the powers conferred upon it by the Compensation Act are conferred on it as a com-

mission, the individual members having no powers which are independent of the commission.

Section 16 of the Act provides for the making of rules by the Commission, and effective July 1st, 1914, the Commission adopted Rule 39, which sets out the requirements for the procuring of self-insurance, and reads as follows:

> "Application for permission to become a self-insurer shall be accompanied by a current financial statement of the applicant, which statement shall show to the satisfaction of the Industrial Commission ability on the part of the employer to discharge accruing liability under the Workmen's Compensation Act. However, no application to become a self-insurer will be entertained by the Industrial Commission unless the applicant for such privilege shall have deposited in the name of an approved trustee and in an approved depositary a fund sufficient to discharge all liability that may have accrued by reason of awards for the payment of compensation that have become final on the date of such application."

This rule requires that employers seeking to become self-insurers shall deposit in the name of an approved trustee, and in an approved depositary, a fund sufficient to discharge all liability which it may have incurred by reason of awards for compensation, and is the only reference, either in the Act or in the rules, to the manner in which such a deposit shall be made. By analogy I believe this governs the method of furnishing or depositing all securities by self-insurers, where no specific method is set out in the Act. In *People* v. *Robertson,* 302 Ill. 422, a case which involved the rules of the State Department of Health, the court said:

> "When these departments or boards duly adopt rules or by-laws by virtue of legislative authority, such rules and by-laws have the force and effect of law and are often said to be in force by authority of the state. *Blue* v. *Beach,* 155 Ind. 121."

In *Rio Grande Irrigation Company* v. *Gildersleeve,* 174 U. S. 603, the court quoted with approval the following from *Thompson* v. *Hatch,* 3 Pick. 512:

> "A rule of the court thus authorized and made has the force of law, and is binding upon the court as well

as upon the parties to an action, and cannot be dispensed with to suit the circumstances of any particular case. * * * The courts may rescind or repeal their rules, without doubt; or, in establishing them, may reserve the exercise of discretion for particular cases. But the rule once made without any such qualifications must be applied to all cases which come within it, until it is repealed by the authority which made it."

I believe that paragraph 2 of Section 26, providing that the employer "shall furnish security, indemnity or a bond" must be read in conjunction with Rule 39, which provides the only way in which security shall be furnished or deposited. In *People* v. *Wiersema State Bank,* 361 Ill. 75, the court said:

> "The rule that the expression of one thing or one mode of action in an enactment excludes any other, even though there be no negative words prohibiting it, has been settled law of this state since 1852. *Vestal Co.* v. *Robertson,* 277 id. 425."

In the case of *Vestal Co.* v. *Robertson, supra,* the court said:

> "The doctrine was also announced and approved in the case of *Diversey* v. *Smith,* 103 Ill. 378, that an affirmative statute introductive of a new law which directs a thing to be done in a certain manner, means that such thing shall not be done in any other manner, even though there be no negative words prohibiting it."

No cases have been called to my attention which construe paragraphs 2 and 4 of Section 26 of the Workmen's Compensation Act, and my own independent search have revealed none. However, after a careful study and analysis of the Act, I am of the opinion that the Legislature has nowhere therein conferred any power on the Industrial Commission to act as a trustee or depositary of securities belonging to employers seeking to qualify as self-insurers under the Workmen's Compensation Act. Under the principles announced in the above cases, I believe that Rule 39 prescribes the only manner in which any such deposit of securities shall be made, and plaintiff was of course chargeable with notice of the existence of Rule 39. *Knass* v. *Madison & Kedzie Bank,* 354 Ill. 554.

Lawrence J. O'Connell's bond, upon which plaintiff brings this suit, contains the following conditions:

"Now if the said Lawrence J. O'Connell shall faithfully perform all the duties pertaining to the office or employment of such Chief Security Examiner, Industrial Commission, Department of Labor, and shall faithfully account for and pay over to the parties entitled thereto, all moneys that shall come into his hands by virtue of said office or employment, and shall account to and turn over to his successor in office, or to such other persons as may be designated by his superior officer, all records, property, money, books and papers, and all other property appertaining to his office or employment, whole, safe and undefaced, that shall come into his hands by virtue of said office or employment, this obligation to be void; otherwise to remain in full force and effect."

Plaintiff urges that the bond is termed an official bond, and therefore under it Lawrence J. O'Connell was obliged to account to third parties for all moneys coming into his hands "by virtue of said office or employment." Also that the bond afforded protection to the third parties who deposited securities with the Commission because it provided that O'Connell "shall faithfully account for and pay over to the parties entitled thereto all moneys that shall come into his hands."

O'Connell had no duty pertaining to his office or employment which required him to accept or hold plaintiff's United States Treasury bond as a surety or depositary, either on his own behalf or on behalf of the Industrial Commission. Plaintiff's security not having come into O'Connell's hands by virtue of his office or employment, I am of the opinion that his failure to return the same constituted no breach of his official bond. The rule is stated in Corpus Juris, page 1068, as follows:

"Liability upon an official bond arises as a rule only with reference to acts of the officers which pertain to some function or duty which the law imposes on his office. Thus sureties are not liable for a personal act of an officer not done as a part of, or in connection with his official duties; and where he acts without any proc-

ess and without the authority of his office, or under a process void on its face, in doing such act he is not to be considered as an officer but a personal trespasser. The sureties upon an official bond are, however, liable for an abuse of the authority vested in the principal; and where an officer acts under lawful process, his sureties will be liable for injuries resulting from his negligence or wilfulness in the execution thereof."

In Meachem on Public Officers, section 283, it is said:

"So the liability of the sureties is to be limited to the official acts of the principal only, and is by no means an undertaking against every act that he may chance to commit. As is said in a leading case, 'the sureties do not bind themselves to protect the public against every act of the principal, nor do they become his sureties to keep the peace.' So it is said 'It is an official act, a failure to perform an official duty, or perform it in an improper manner, which comes within the scope of the surety's undertaking.' And again, 'For acts not within the line of official duty and authority, nor under color of office, (the officer) may incur personal, not official, responsibility; and in that personal responsibility, the sureties on his official bond are not involved."

In *Howard* v. *United States,* 97 Fed. (2) 243 (C. C. A. 7th), the court said:

"Contracts of sureties on official bonds are *strictissimi juris.* The instrument is required by statute, which defines its terms, and the law of the office is a part of the contract. The surety guarantees the faithful discharge of all duties properly pertaining to the office, and the extent of such liability can only be determined from the bond and from the statutes creating the office and defining the terms of the bond. See *Low* v. *City of Guthrie,* 4 Okla. 287, 44 P. 198."

59 A. L. R. page 81, states the rule thus:

"There is ample authority in support of the rule that sureties on the official bond of a clerk of court are not liable for a loss resulting from the clerk's default with regard to money paid into his hands by virtue of his office, where such money is received by the clerk illegally or without the proper authority."

I find nothing in the language of the employee's bond which leads me to believe that the Fidelity & Deposit Company of Maryland in furnishing the bond of a single employee of the Commission intended also to cover all amounts which might be deposited with the Commission by self-insurers. Any amount so deposited would of necessity fluctuate, according to the number of self-insurers who deposited securities and the amount required in each individual case. For instance, in the thirty-four cases where deposits were made with the Chief Security Examiner by self-insurers, the instant case being one of them, the securities so deposited had a value of hundreds of thousands of dollars, all of which was allegedly misappropriated.

Holding, as I do, that the Commission had no power to act as a trustee or depositary, it follows that O'Connell had no greater power than what the Commission itself possessed, and therefore the securities in question did not come into his hands by virtue of his office.

Defendant's motion for summary judgment in its favor as to all relief asked against it in Count Two of the complaint, is granted, with costs.